

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Treatment of Rate Incentives)
and De Minimis Rate Increases)
For Price Cap Purposes)

Docket No. RM2014-3

PUBLIC REPRESENTATIVE REPLY COMMENTS

(April 17, 2014)

The Public Representative hereby responds to comments filed in this proceeding pursuant to the Commission's notice of proposed rulemaking on the treatment of rate incentives and de minimis rate increases for price cap purposes.¹

I. INTRODUCTION

The Notice proposes to amend various Commission rules in 39 CFR Part 3010 for five primary purposes. The rule changes would: 1. Clarify and standardize the Commission's treatment of incentive rate reductions, most notably with the addition of a Type 1-C rate adjustment for rate decreases; 2. Limit the creation of additional cap authority for promotional and incentive rates to rates of general applicability and clarify the treatment of rate incentives that are not rates of general applicability; 3. Allow for de minimis rate adjustments without recalculating the annual limitation or generating unused rate adjustment authority; 4. Clarify the treatment of deleted rate cells; and 5.

¹ Notice of Proposed Rulemaking on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, November 18, 2013 (Notice).

Improve other aspects of the process for market dominant rate adjustments. Notice at 1.

Comments were filed by five interested parties.² The Comments generally support the proposed rules, but request the Commission to: 1. Clarify the definition for rates of general applicability, 2. Clarify the definition of a deleted rate cell, 3. Disallow Postal Service deferral of its election to recoup unused rate authority, and 4. Increase the percentage limit for de minimis rate adjustments. PostCom also suggests that incentive volumes be “trued-up” and that the Postal Service show good cause in order to include incentive rates in the percentage rate adjustment.

. The Public Representative supports the proposed rule limiting the addition of unused rate cap authority for incentive rates to rates of general applicability and treating volumes related to incentive rates not of general applicability like Negotiated Service Agreement (NSAs) volumes as if they were mailed at the full rate for purposes of calculating price cap compliance.

The proposed rule avoids the discriminatory impact of increasing price cap authority for mailers ineligible for incentive or promotional rates. It will also reduce uncertainty for mailers. However, the Public Representative believes several of the suggestions in the Comments are well-taken and justify some modification of the proposed rule. Additional explanatory discussion by the Commission regarding volume-based incentive rates and promotional programs would be desirable.

² Association for Postal Commerce (PostCom); Joint Comments of the National Association of Presort Mailers, The Major Mailers Association and The Association for Mail Electronic Enhancement (Joint Commenters); National Postal Policy Council (NPPC); Pitney Bowes Inc., and United States Postal Service (Postal Service).

II. DISCUSSION

A. Clarification of Definition of Rates of General Applicability

Four of five commenters request clarification of the definition of rates of general availability.³ Proposed Rule 3010.1(g). They ask the Commission to explain how it would handle certain cases likely to recur, such as incentive rates based on volume which are dependent on a factor other than the characteristics of the mail to which the rate applies. The commenters raise the question of whether incentive rates based on volume may be considered rates of general applicability for purposes of calculating unused rate authority.

PostCom points out that a narrow construction of the definition of rates of general applicability will protect mailers excluded from a promotional rate program from additional pricing authority. It requests the Commission to explain why certain promotions identified in the Notice are, or are not, rates of general applicability. *Id.* at 6. PostCom argues that the part of the definition of a rate of general applicability (that eligibility cannot be dependent on factors other than the characteristics of the mail to which the rate applies) suggests volume incentive rates could never be rates of general applicability. PostCom at 4. It also notes the Commission has not indicated how a volumetric eligibility for a summer sales would be treated. *Id.* Other incentive rates seemingly applicable to mail characteristics have been found to be not rates of general applicability. *Id.*

A clear definition of rates of general applicability helps to insure that the flow-through of the cost of incentive rates *not* of general applicability are paid only by mailers

³ Joint Commenters at 4, NPPC at 4, PostCom at 3-7 and Postal Service at 3-6.

potentially benefitting from the incentive rates. To resolve questions about whether incentive rates based on volume might increase the price cap authority, it is useful to consider the purposes and impact of an application of the rule. The discount offered by an incentive rate is, in effect, a marketing cost of the incentive incurred for the benefit of the mailers eligible for a special discount. It is likely to be factored into rates at a later date. If only one or a few mailers benefit from the discount, they should ultimately bear the cost. Discounts that generally increase the overall use of the mails or encourage additional mailing for an entire class will benefit all mailers in the class. In that case, all mailers in the class should pay the costs of the volume-based discounts.

The proposed rule indicates the Commission is recognizing the unfairness of requiring mailers ineligible to participate in rate incentives (discounts) and later requiring those mailers to pay a share of the costs of the discounts through higher rates. The Commission has made a reasonable policy choice by drawing the line at single mailers or at groups of mailers with written agreements for discounts or when rate incentives are dependent on factors other than the characteristics of the mail to which the rate applies.

However, the Public Representative agrees with NPPC that some discussion in the Commission's final order specifying the types of discounts to which the definition might apply would relieve ambiguity about those rate incentives eligible to increase price cap authority. NPPC Comments at 4. To the extent the Commission can generalize about types of rate incentives that are not dependent on factors other than the characteristics of the mail to which the rate applies, and thereby avoid future case-by-case litigation on the question of whether a particular kind of promotional rate is one

of general applicability, the Commission should exercise this opportunity to clarify its policies. Volume discounts can vary in purpose and effect so that a rule to cover all volume discounts is not practical and, for some discount programs, the issue must remain for case-by-case interpretation.

Postal Service alternative. The Postal Service is the only commenter who objects to limiting the use of price cap authority to rates of general applicability. Postal Service comments at 6. With the exception of promotions applying to a single mailer, the Postal Service would allow all rate incentive programs to be included in price cap calculations. *Id.* at n. 10. It contends that the proposed rule would discourage the Postal Service from targeting rate incentives that could more effectively drive beneficial mailer behavior. *Id.*

The Public Representative does not agree with the broad brush approach the Postal Service requests, and favors different treatment for rates of general applicability than for rates not of general applicability. The Postal Service contends, without example or other support, that the Commission's rule would "discourage it from developing targeted rate incentives that could more effectively drive beneficial mailer behaviors." *Id.* In the Public Representative's view, at a minimum, the rule must deny price cap authority to a single mailer or where a group of mailers enter into a written agreement with the Postal Service. Proposed Rule 3010.1(g). Permitting all discounts to be included in rate cap calculations would open the door to perceived preferential treatment or favoritism in the structure of promotional rates or incentive programs..

B. Effect of Deletion of Rate Cell on Price Cap Treatment

Four commenters would limit the application of proposed rule 3010.23(d)(4). The proposed rule specifies adjusting billing determinants to zero for purposes of calculating the percentage change in rates upon the deletion of a rate cell. Joint Commenters Comments at 2-3, NPPC Comments at 6, Piney Bowes Comments at 2-3 and Postal Service Comments at 7-8. They claim the rule should apply only if the rate cell deletion is due to a product transfer rather than any other reason, such as, for example, the effect of the recent IMb mandate that effectively eliminated rate cells. Joint Commenters at 2-3. Pitney Bowes proposes modification of the language to apply adjustments for deletion of rate cells “due to product transfer.” Pitney Bowes’ language would, without explanation, eliminate the proposed proviso “when an alternate rate cell is not available” in lieu of adjusting the billing determinants for the rate cell to zero. Pitney Bowes comments at 3.

The Public Representative disagrees that the cell deletion should be limited to product transfers. The purpose of the rule is to correctly calculate the billing determinants and thereby the revenue. A rate cell may be deleted for any one of several reasons apart from product transfers. Rule 3010.23(d)(2), cited in Rule 3010.23(d)(4), recognizes permissible adjustments may result from deletion of a rate cell, but that rule does not limit the deletions to product transfers. The example of the IMb case cited in the Comments may be an instance requiring special consideration, but that situation is unusual. This issue is better handled on a case-by-case basis. The proposed rule should not be limited to product transfers.

Alternatively, the Postal Service proposes the Commission defer implementing the rule to zero out deleted rate cells in the absence of an alternative cell until the

completion of a Commission rate case currently pending on appeal.⁴ Postal Service Comments at 8. At best, that case would likely resolve the application for deletion of a cell only in the context of that case and not to other instances. Whether or not a cell is considered deleted in the context of the IMb case, the overriding purpose of the rule regarding deletions is to ensure that mailers are not harmed by large rate increases when a rate cell is deleted. Regardless of the outcome of the court's ruling, whether to insert a volume into a certain rate cell would depend on the particular case. Even for a rate cell that is not technically deleted as defined by a court, the Commission must determine the appropriate volume for the rate cell to ensure mailers are not unduly harmed by the result. Moreover, deferral of implementation of the rule would not assist in finalizing several instances where products have been transferred recently to the competitive product list.

C. Deferral of Election to Recoup Unused Rate Adjustment Authority

The Joint Commenters believe the proposal to permit the Postal Service to defer its election to recoup unused rate adjustment authority for rate decreases of general applicability will complicate the unused rate adjustment calculations and “may reduce rate predictability and stability.” Joint Commenters at 3, *see also* NPPC at 5. They propose that the election should be required when the Type 1-C rate adjustment is filed. *Id.*

The Public Representative is not convinced that deferred election would overly complicate the rate adjustment calculations to the extent the Postal Service should be prohibited from delaying its decision whether to make an adjustment to its unused rate

⁴ U.S. Postal Service v. PRC, No. 13-1308 (D.C. Cir. Filed Dec. 20, 2013).

adjustment authority. The opportunity for deferral provides some degree of flexibility to the Postal Service. In certain cases, after experience with the promotional or incentive rate, the Postal Service may decide that due to limited success or usage of a promotional program, adding the amount of the discounts to its unused rate adjustment authority is not warranted. The proposed rule provides the Postal Service flexibility consistent with administrative convenience.

D. True-Up Volumes

PostCom suggests the Postal Service should be required to reconcile the actual volumes sent at promotional rates with the adjustment authority it claims in the next scheduled rate adjustment. PostCom argues that assuming larger volumes are initially contemplated than are actually mailed under the incentives, the impact on the price authority will be overstated.. PostCom at 7-8, see Order No 1541 at 17.

The Public Representative believes this adjustment would be useful and not an onerous requirement for the Postal Service. The proposed rule should be modified to provide that the volumes actually mailed in the promotional program will be used in calculating the next rate change. A true-up of volumes requirement may require revision of section 3010.23(d) to insure appropriate billing determinants are applied.

E. A Good Cause Standard would be too Broad and Promote Controversy

PostCom appears to suggest that it prefers a more general standard than the specific rules proposed for including promotional and incentive rates in percentage rate change calculations. It would apply a default rule requiring *exclusion* of incentive rates from the percentage rate change calculations unless the Postal Service “demonstrates good cause to account for promotional and incentive programs in another manner,” *i.e.*

to include them in the percentage rate change calculation. PostCom at 9. PostCom is concerned that once price cap authority is created, it is essentially “baked in’ for future price changes. *Id.*

PostCom’s “good cause” standard would be less desirable than the specific rules proposed in the Commission’s Notice. The proposed rule will eliminate controversy likely to arise over the adequacy of the Postal Service’s showing of “good cause.” The proposed rule eliminates uncertainty, and avoids placing the burden upon the Postal Service to justify including its incentive rates in the percentage change calculations when all mailers in the class may benefit from a particular rate incentive.

F. De Minimis Amount May be Too Low

The Postal Service requests the Commission to increase the maximum amount allowed for a de minimis Type 1-A rate adjustment. Postal Service Comments at 8-9. Rule 3010.30(a)(2) limits an adjustment, or the sum of all adjustments, following the most recent Type-1-A or Type-1-B rate adjustment to 0.001 percent.

The Public Representative strongly supports the rule for de minimis adjustments to increase pricing flexibility and to reduce regulatory costs and delays. Although seemingly de minimis adjustments of Postal Service rates could lead to undesirable results by causing mailers to incur costs from either adjusting their marketing materials to change prices or to modify their software, no mailer has objected to the proposed de minimis rule.

The Public Representative agrees with the Postal Service that the defined de minimis percentage may be so low that, in many cases, it would not be available for the Postal Service to benefit from the rate flexibility the rule is intended to provide.

The Public Representative believes the de minimis amount should be as large as practical and supports a 0.05 de minimis ceiling proposed by the Postal Service in certain instances. *Id.* at 9 n. 18. The Postal Service's Comments suggest that it would be invoking the de minimis provision to correct errors in rate calculations or for rate adjustments of low volume products or for ancillary services. The Public Representative suggests the de minimis amount might be increased up to a limit of 0.05 percent, rather than the limit of 0.001 percent, if the rate adjustment is for the correction of calculation errors or pursuant to Commission directive.

G. Technical Corrections

The Postal Service suggests the Commission make provision in Rule 3010.27(a) for adding unused rate authority from a Type 1-C rate adjustment when an exigent rate case was the rate adjustment most recently filed, rather than a Type 1-A or Type 1-B rate adjustment. Postal Service Comments at 2-3. The Public Representative concurs with the Postal Service's suggestion.

Similarly, just as the Postal Service noted the potential for an exigent rate case should be recognized in rule 3010.27(a), it appears that provision for an exigent case also should be included in sections 3010.30(a)(2) and 3010.30(e).

III. CONCLUSION

The Public Representative submits the foregoing Reply Comments to the Comments in this proceeding for the Commission's consideration.

Respectfully submitted,

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